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IN THE SUPREME COURT
OF THE UNITED STATES

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL
STATE OF MISSOURI,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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24 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. Congress does not have unlimited power to expand the authority of State subdivisions, as the Missouri Municipals claim. 2

II. The phrase, "any entity," is too broad to meet the *Gregory v. Ashcroft* test. 8

III. That there may be a pro-competitive justification for the policy of allowing government units to compete in the telecommunications marketplace does not affect the *Gregory* analysis. 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES **Page**

City of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424 (2002) 4-6, 8

Coyle v. Oklahoma, 221 U.S. 559 (1911) 7

Gregory v. Ashcroft, 501 U.S. 452 (1991) . . . . . ii, 1-2, 8-11, 15, 17

Jinks v. Richland County, 123 S.Ct. 1667, ... 5

Lawrence County v. Lead-Deadwood School Dist. No. 40-1, 469 U.S. 256 (1985) 3-4

Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) 6

New York v. United States, 505 U.S. 144 (1992) 3

Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998) 9

Raygor v. Regents of Univ. of Minn., 534 U.S. 533 (2002) 5

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 4

Salinas v. United States, 522 U.S. 52 (1997) 10

State of New York v. United States, 326 U.S. 572 (1946) 7

United States v. Western Electric, Court Action No. 82-0192, U.S.D.C. D.C. (1982) 12

Vermont Agency of Natural Resources v. United States ex. rel Steven, 529 U.S. 765 (2000) 9

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 4-7

FEDERAL CONSTITUTIONAL AND STATUTORY AUTHORITIES

United States Constitution, Article I, § 8 . . 2-3, 5

United States Constitution, Article III, § 1 5

United States Constitution, Amendment X 1, 2, 8, 17

Americans with Disabilities Act 9

Federal Telecommunications Act of 1996 . . . . . 1, 9-12, 16

Public Utility Holding Company Act 11-12

28 U.S.C. § 1367(d) 5

31 U.S.C. § 3729(a) 9

47 U.S.C. § 253(a) 1-2, 4-6, 8-15, 17

47 U.S.C. § 253(b) 13-15

47 U.S.C. § 254 14

47 U.S.C. § 271 12

S.1822, 103d Cong., 2d Sess. (1994) 11

STATE CONSTITUTIONAL AND STATUTORY AUTHORITIES

Mo. Rev. Stat. § 392.410.7 . . . . . 13, 15, 17

OTHER AUTHORITIES:

BLACK'S LAW DICTIONARY (7th ed. 1999) 14

Table 17.2, FCC Report, Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, August 2001. File Names: TREND101.ZIP, TREND101.PDF AT www.fcc.gov.ccb.stats. . . . 16

INTRODUCTION

In his opening brief, petitioner Nixon, on behalf of the State of Missouri, points out that the Tenth Amendment's protection of state sovereignty – a key element in American federalism – affects the analysis here in two closely related respects. First, it bars any interpretation of § 253(a) of the Federal Telecommunications Act of 1996 that would remove from the States a key element of their sovereignty: the power to determine the scope of what their own subdivisions can do. Second, it requires that when Congress approaches the limits that Tenth Amendment federalism imposes on its power, it must do so clearly and unmistakably. *See Gregory v. Ashcroft*. 501 U.S. 452, 460-461 (1991).

The respondents, the "Missouri Municipals," run headlong into the constitutional wall when they characterize § 253(a) as entirely removing any state limits that even indirectly prevent them from entering the commercial telecommunications business. Of course, they deny that their argument goes that far, asserting that § 253(a) "is not an unprecedented or extraordinary intrusion on the authority of States to regulate matters pertaining to their subdivisions, and it does not raise any substantial constitutional questions." (Respondents' Brief ("MML Br.") at 7) But the Missouri Municipals articulate no limits on congressional authority. Indeed, implicit within their argument is the conclusion that merely by exercising their sovereign prerogative to create even specialized political subdivisions, the States concede to Congress a right to expand the authority of those subdivisions. In other words, by exercising its sovereign authority to create any political subdivisions, Missouri gave Congress the ability to transform that subdivision, extending its scope into areas Missouri never contemplated.

Though this Court may have never precisely defined the point at which Congress's ability to usurp state sovereignty ends, it also has never found in the Commerce Clause (Art. 1, § 8, par. 3) authority for Congress to redefine the nature of state subdivisions in the fashion the Eighth Circuit has allowed.

To keep Congress at a safe distance, the Court has erected a prophylactic barrier that prevents Congress from breaching the constitutional wall that protects state sovereignty: the "clear statement" requirement most clearly articulated in *Gregory v. Ashcroft*. That barrier works in two ways. Legally, it eliminates many, perhaps inadvertent, approaches to the constitutional wall. Politically, it gives the states a warning when Congress threatens to breach state sovereignty. But the Missouri Municipals would transform the "clear statement" barrier into something so easily moved that it provides the States with no protection whatsoever.

Worded as it is and properly interpreted within the framework of the Constitution as outlined by this Court's interpretive opinions, § 253(a) would not present an incursion on the authority of States to regulate their own political subdivisions and would not, consequentially, be unconstitutional.

ARGUMENT

I. Congress does not have unlimited power to expand the authority of State subdivisions, as the Missouri Municipals claim.

The "plain statement rule" in *Gregory v. Ashcroft* notwithstanding, Congress cannot take away all powers of the State. To do so would violate the Tenth Amendment no matter how well intentioned a statute may be. In other words, the Tenth

Amendment carves out some ground of sovereignty upon which Congress cannot lawfully tread – even if the exercise of that portion of state sovereignty could affect commerce. The exact line beyond which Congress cannot go is not well marked. And it is not a line that this Court has to draw to allow Missouri's statute to withstand preemption.

The Missouri Municipals do not and cannot dispute that control of subdivisions is a core element of state sovereignty. *See New York v. United States*, 505 U.S. 144 (1992). To parry Missouri's defense of that element, the Missouri Municipals formulate an attack that consists largely of discussion of a handful of cases in which this Court upheld congressional acts that affect those subdivisions. But never in any of those decisions did this Court suggest Congress could do what the Missouri Municipals claim Congress did here: use the Commerce Clause power to bypass the States entirely and directly authorize political subdivisions to extend or even transform themselves, entering commercial businesses beyond the imagination of the legislators who voted to authorize their creation. Typically, those cases confirm congressional power to affect how subdivisions operate within the scope of state-granted authority, not whether Congress can expand that authority.

The Missouri Municipals cite *Lawrence County v. Lead-Deadwood School Dist. No. 40-1*, 469 U.S. 256 (1985), broadly asserting that there, the Court upheld congressional power to grant local government certain prerogatives that State law could not override. *Lawrence County* is a spending power (Art. 1, § 8), not a Commerce Clause case; it arose in the context of Congress appropriating federal money to local governments. The Court held that South Dakota could not seize those funds for

another purpose. *Id* at 268. In other words, Congress controlled who received federal funds, and barred someone other than the recipient from taking them. That is a far cry from forcing a State to accept that Congress just handed one of its political subdivisions authority to dive into the commercial phone business, regardless of that subdivision's lack of state authority to become an entrepreneur and at the expense of private sector, taxpaying competitors. Moreover, the statute involved in *Lawrence County*, though not completely unambiguous (*id.* at 261), was clearer in its terms than is § 253(a), and the statute's legislative history, as admitted by respondent in that case, evidenced a clear intent by Congress (*id.* at 262).

The extent of the Missouri Municipals' discussion of *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002) and *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991) is puzzling. In those cases the Court, overall, was respectful of the kind of state sovereignty that the Missouri Municipals deny exists.

In *Ours Garage*, the Court states a truism: that preemption analysis "start[s] with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." 536 U.S. at 432, citing *Mortier*, 501 U.S. at 605, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Court goes on to quote *Mortier*: "The principle is well settled that local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." 501 U.S. 597 at 607-608, quoted at 536 U.S. at 433. But the Court then affirms a central premise of Missouri's argument

here: "Whether and how to use that discretion is a question central to state self-government." 536. U.S. at 437. Missouri has used its "absolute discretion" to define the authority of its subdivisions in a way that precludes, for the time being, their entry into the commercial telecommunications business. Nothing in *Ours Garage* suggests that Congress has unfettered authority to deprive the states of that discretion – *i.e.*, to itself answer this "question central to state self-government."

Rather than *Ours Garage* or *Mortier*, the case cited by the Missouri Municipals that comes closest to supporting their argument is *Jinks v. Richland County*, 123 S.Ct. 1667 (2003). There, this Court upheld 28 U.S.C. § 1367(d) (1976). 123 S.Ct. at 1672. That statute tolls state statutes of limitation on state law claims during the period in which a federal cause of action is pending. The Court did not, however, suggest that such a step was authorized by the Commerce Clause. Rather, the Court held that § 1367(d) is necessary and proper in executing Congress's power "[t]o constitute Tribunals inferior to the supreme Court[,]" and "to assure that those tribunals may fairly and efficiently exercise, '[t]he judicial Power of the United States[.]" *Id.* at 1671, citing Art. I, § 8, cl. 9 and Art. III, § 1.

In applying § 1367(d) to municipalities, in *Jinks* the Court cast aside concerns that, as held in *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002), § 1367(d) does not apply to claims against States. It held that the statute "is not an encroachment on 'state sovereignty,' but merely the consequence of those cases (which respondent does not ask us to overrule) which hold that municipalities, unlike States, do not enjoy a constitutionally protected immunity from suit." 123 S.Ct. at 1673. By contrast to § 1367(d), § 253(a) is not based on

Congress's need to constitute tribunals inferior to this Court and its responsibility to assure the fair and efficient exercise of judicial power by the United States. And it does not infringe on a right claimed, under state law, by municipalities; it infringes on a right claimed by the sovereign states themselves.

The Missouri Municipals also rely on this Court's sovereign immunity cases, i.e., cases dealing with immunity possessed by sovereign states, delegated to non-sovereign municipalities. This Court has, as the Missouri Municipals suggest, found a limit on the scope of such delegated immunity: "If a state wishes a power to be exercised free of risk of liability, it must retain the power in 'an arm of the State' . . . it cannot delegate that power to a political subdivision." (MML Br. 31, quoting *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977)). But the foundation of that conclusion is that sovereignty lies with the State, not with local government – a foundation that also supports Missouri's assertion that the States create and control municipalities and municipal utilities, a philosophy this Court has honored for nearly a century. (*See* Petitioner Nixon's ("Nixon") Br. 9-17). To suggest, as the Missouri Municipals do, that by holding that the State cannot delegate its sovereignty, the Court somehow ruled that Congress can overrule a decision not to delegate, makes no sense at all.

Nor does the one concession that the Missouri Municipals suggest might be a limit on the scope of their argument for congressional power: a distinction between state subdivisions' regulatory powers and their commercial activities. *See* MML Br. at 26 n. 11 (*Mortier* and *Ours Garage* "implicate State sovereignty much more directly than Section 253(a) does . . . Because those cases concerned the States'

control over their subdivisions' regulatory powers, not just over the subdivisions' commercial activities."). The Missouri Municipals concede that "[r]egulatory authority is the defining feature of government." *Id.* at 28. But their effort to distinguish "regulatory authority" from "commercial activity by a political subdivision" means nothing here, for what is at issue is the States' "regulatory authority": their ability to regulate the scope of activities of the subdivisions they authorized and for which they, ultimately, are responsible. As recognized in the cases discussed in Missouri's opening brief, this Court has recognized that States regulate the ability of subdivisions to operate in many ways. (Nixon Br. 12-14). And the regulation at issue here is no further removed from the core of state sovereignty – and extends no further into the realm of commerce – than is regulation of the purchase and ownership of real property or choosing the locale of its seat of government. *See State of New York v. United States*, 326 U.S. 572, 582 (1946) and *Coyle v. Oklahoma*, 221 U.S. 559 (1911).

Aside from this regulation/commercial activity distinction, the Missouri Municipals make no meaningful attempt to define any line that Congress cannot cross in exercising its Commerce Clause powers against the States' definition of their subdivisions' authority. That failure highlights the true breadth of their position: that there is no limit on congressional power, so long as the authority Congress gives to state subdivisions somehow relates to interstate commerce.

Attempting to draw a negative inference to support the conclusion that there is no limit, the Missouri Municipals assert that no justice of this Court has ever suggested that it would be unconstitutional for Congress to grant limited powers to a

local government if a state law were unconstitutional. (MML Br. 31, 33). That may well be true. But the Missouri Municipal's explanation – that no justice has commented on a limit because there is no limit – is the least likely of the possible explanations for that dearth of authority. More likely, the Court has never been faced with a challenge to state sovereignty quite like this one. And most likely, when the Court considers a statute that approaches a point of unconstitutional usurpation, it finds ambiguity and resolves it against preemption – using the *Gregory v. Ashcroft* rule.

II. The phrase, "any entity," is too broad to meet the *Gregory v. Ashcroft* test.

Missouri is cognizant of Justice Scalia's assertion, in his dissent in *Ours Garage*, that a State's right to control its own political subdivisions is not within the sacrosanct ground of Tenth Amendment protection. 536 U.S. 424, 448 (2002). As discussed above and in its opening brief, Missouri respectfully disagrees. But even the Eighth Circuit concluded that the right to control political subdivisions is so close to the impenetrable realm of state sovereignty that any effort to encroach upon it must be subject to the *Gregory v. Ashcroft* "clear and manifest" rule. (Nixon Pet App. A-8). Despite exhaustive efforts in their brief, the Missouri Municipals fail to find a "clear and manifest" statement in § 253(a) that Congress intended to bar the very states whose "statutes," "regulations," and "legal requirements" are at issue from regulating the activities of their own political subdivisions.

Not surprisingly, the Missouri Municipals' first approach is to avoid *Gregory v. Ashcroft* entirely. They state that *Gregory v. Ashcroft* applies only when a statute is ambiguous, and they argue that

§ 253(a) is not ambiguous (MML Br. 36), insisting that the meaning of § 253(a) is plain because "any entity" is so broad as to cover literally everything. Were that true, there would not be such a difference of opinion among the courts as to the meaning of "any entity." *See* Nixon Pet. 9-12. And if the use of a broad term were sufficient, the *Gregory v. Ashcroft* rule would have little application, and even less meaning. Certainly, it is possible to call state subdivisions "entities" and thus to include them among "any entities"; there are definitions of "entity" that could encompass the concept of municipalities or political subdivisions. But "entity" is an amorphous word, akin to "thing" or "stuff." Under *Gregory v. Ashcroft*, the use of such amorphous words has never been enough. *See, eg. Vermont Agency of Natural Resources v. United States ex. rel Steven*, 529 U.S. 765, 787 (2000) (the False Claims Act's use of "any person," 31 U.S.C. § 3729(a), does not provide the requisite affirmative indications to include States for the purpose of *qui tam* liability.)

Arguing to the contrary, the Missouri Municipals place great reliance on *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). There, the Court held that "public entity" met the *Gregory v. Ashcroft* test and included state prisons among the bodies responsible to adhere to the Americans with Disabilities Act ("ADA"). Of course, "public entity" is considerably more specific and clear than "any entity." But the distinction does not end there; the statute adjudicated in *Yeskey*, Title II of the Americans with Disabilities Act, contained a definitions section. The definition of "public entity" included language that made clear a congressional intent to impose certain provisions of the ADA on States, including their subdivisions. *Yeskey*, 524 U.S. at 209-210. By contrast, the Federal Telecommunications Act of 1996 does not provide a

definition of "entity." Nor does it provide a contextual framework to gather one's bearing regarding the use of that word. Therefore the Missouri Municipals' (and for that matter, the Eighth Circuit's) reliance on *Salinas*' discussion of the term "any" begs the question of the meaning of "entity." *Salinas v. United States*, 522 U.S. 52 (1997).

Salinas stands for the premise that the word "any" is an inclusive term. No one debates that premise. But "any" does not add context to the term "entity," any more than it would put context on the term "car." Would "any car" include sport utility vehicles, pick up trucks, and Matchbox™ cars? The context of Congress' use of the term "any entity" in § 253(a) is not clear. Placing the all-expansive modifier "any" before "entity" does not provide a good contextual compass.

Nothing in § 253(a) or the rest of the Federal Telecommunications Act of 1996, nor its legislative history, provides any meaningful evidence that in drafting § 253(a), Congress purposefully, intentionally, clearly, or unmistakably elected to interfere with the States' sovereign right to control their own political subdivisions.

Though the State is insisting that *Gregory v. Ashcroft* does not – and should not – permit Congress to draw in the States and their subdivisions merely by using amorphous terms like "entity," the State is not insisting, as the Missouri Municipals suggest (MML Br. 7-8, 37), that § 253(a) fails because Congress did not "explicitly mention municipalities." Under *Gregory v. Ashcroft*, the question is whether the inclusion is "clear and manifest," not whether Congress uses some magic word. Congress could have made its intent clear and unmistakable in a variety of ways. An express

inclusion of municipal utilities would have been the best way to solve § 253(a)'s *Gregory* problem. But Congress could also have defined "entity" in some other way that nonetheless demonstrated a conscious choice to unbalance federal and state sovereignty.

The Missouri Municipals implicitly suggest that Congress can meet the *Gregory v. Ashcroft* standard not just through statutory language, but also through legislative history. In doing so, they fail to explain why the statements of legislators should be allowed to give constitutionally sufficient clarity where the statutory language itself fails to do so. But even if legislative history were an appropriate remedy to a *Gregory* problem, the Missouri Municipals' argument would fail, for they grossly overstate the historical case.

They assert, "There is incontrovertible evidence that Congress intended to enable utilities to enter, and compete in, telecommunications markets." (MML Br. 18). While it may be true that Congress intended to enable utilities to enter telecommunications markets, there is no incontrovertible evidence Congress actively considered municipalities' entrance into those markets, and there is no evidence whatsoever that Congress weighed the concern of state sovereignty in drafting the language of the '96 Act. The Missouri Municipals spend pages (MML Br.18-21) discussing the Act's legislative history. What they do not tell this Court is that the discussion of the Act's predecessor bill, S.1822, took place in the context of a hearing relating to whether public utility holding companies, which are restricted in many ways under the Public Utility Holding Company Act ("PUHCA"), should be able to compete in the telecommunications markets. The consensus, which none of the petitioners

debate, is that they should. But, neither municipalities nor municipal utilities are PUCHA regulated companies. So when the Missouri Municipals cite a couple of phrases from Senator Lott, they are pulling the quotes out of context. The Missouri Municipals are borrowing statements made in the context of private enterprise competition.

The '96 Act was specifically designed to break the stranglehold the regional bell operating companies ("RBOC's") had on local service monopolies. It applied a carrot and stick approach, with the stick being a codified injunctive action, essentially tracking the federal court order that broke up AT&T in 1982. *See* Consent Degree issued August 24, 1982, *United States v. Western Electric*, Court Action No. 82-0192, U.S.D.C. D.C.; 47 U.S.C. § 271. The Act barred the RBOC's from providing long distance service until they had opened their local facilities to competition. 47 U.S.C. § 271. The Act and its legislative history are devoid of any meaningful discussion that municipalities or municipal utilities could or should be the RBOC's competitors. There are no statements in the Act's history that remotely suggest Congress considered the rights of the States as sovereigns to control the activities of their own political subdivisions and, notwithstanding States' sovereignty, chose to interfere with that fundamental element of States' rights.

The Missouri Municipals also describe a parade of horrors that would result, they say, from excluding state subdivisions from among the "entities" protected by § 253(a). But the parade is an illusion.

The Missouri Municipals assert that if "any entity" were read to exclude all state subdivisions, it might exclude private enterprises (MML Br. 9). That argument leaves out a critical factor: the body

of precedent regarding the relationship between a state and its municipalities, including municipally-owned utilities. (*See* Nixon Br. 9-17). Neither that body of precedent nor the States' core sovereignty is offended by Congressional action that preempts restrictions on private enterprise ventures in areas of commercial services. The States all create different forms of business organizations for the purpose of offering limitations on liability. The States do not generally cling to a business organized under their state laws the same way they do to the very subdivisions they create, with good reason. The latter enjoy the sovereign authority specifically delegated to them by their State parent. Private enterprise does not exercise any sovereign authority.

The Missouri Municipals next lament that the FCC would be distinguishing between political subdivisions and entities. In actuality, the FCC's preemption analysis will not be much different than it has been. The FCC will examine a statute under its § 253(a) analysis and receive comments from all or anyone. A State will have the opportunity to defend its statute and can advise the FCC if its law pertains to a political subdivision. The FCC will be looking to see if a statute restricts competition. If that statute applies to political subdivisions, as Mo. Rev. Stat. § 392.410.7 does, the FCC will continue what it has done with the Texas and Missouri laws – respect state sovereignty. If the state statute is directed elsewhere, the FCC will assess whether it is competitively neutral under § 253(b). It is unlikely that the problem of discerning upon whom a state statute is applicable will need resolution by the FCC. If a political subdivision is acting outside its authority through some form of business venture, in all likely the State will resolve that issue in state court through injunction or writs of mandamus or prohibition.

In describing illusory horrors, the Missouri Municipals brush past, but essentially ignore, the Pandora's box that their own view of § 253(a) opens. Thus they assert that "the language of Section 253(a) is unequivocal" and announce they will disprove petitioners' argument that employing an all-inclusive definition of "entity" produces absurd results. (MML Br. 21). But they fail to deliver. Instead, in responding to the argument that the Eighth Circuit's definition of "any entity" now empowers Missouri's Interior Design Council, an "entity" using the Black's Law Dictionary definition employed by the Eighth Circuit to enter the telecommunications business, the Missouri Municipals point the State to § 253(b) for relief. But § 253(b) cannot give the State effective relief – at least not without also depriving the Missouri Municipals of the victory they seek.

Section 253(b) states, "Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with Section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, insure the continued quality of telecommunication services, and safeguard the rights of consumers." The Missouri Municipals fail to explain how § 253(b) places any limits on the definition of entity.

Instead, they assert that § 253(b) allows a state to allocate responsibilities among various government officials and agencies without having to authorize each of them to provide telecommunications services. (MML Br. at 22-23). To a certain extent, it is curious that the Missouri Municipals cite § 253(b) for the premise that it allows a state to "allocate" responsibilities, because, that being the case, the State has not "allocated" to any of the Missouri

Municipals the authority to provide telecommunications services.

If § 253(b) protects state sovereignty to the degree the Missouri Municipals claim, then even if the term "any entity" includes political subdivisions, the States are allowed to make their own determinations as to what competitively neutral requirements are necessary to protect the public welfare, ensure quality of telecommunication services, and safeguard the rights of their own consumers. In which case, Missouri, through its general assembly, and specifically through Mo. Rev. Stat. § 392.410.7, has implicitly determined that § 253(b) permits it to protect the public by leaving the risks and the profits of the telecommunications business in non-governmental hands.

Moreover, despite the Missouri Municipals' faith in § 253(b), nothing about it protects Missouri's sovereign right to decide that the Board of Healing Arts is authorized only to regulate the conduct of medical doctors and osteopaths, the Cole County Assessor is authorized only to appraise real and personal property within Cole County, Missouri, and City Utilities of Springfield is authorized only to generate and distribute electricity to Missourians in Springfield – and that none of these "entities" are authorized to enter the commercial telecommunications business.

III. That there may be a pro-competitive justification for the policy of allowing government units to compete in the telecommunications marketplace does not affect the *Gregory* analysis.

The Missouri Municipals want this Court to read § 253(a) from a results-oriented perspective – what

is likely to bring the most competition given that no one argues against the premise that the Telecommunications Act of 1996 envisioned the opening of telecommunications markets. Unfortunately, the Missouri Municipals appear to be re-writing history as it pertains to the '96 Act.

The State of Missouri supports competition and the benefits of competition that are the underlying goal of the '96 Act. It has fought hard at the Missouri Public Service Commission and at the FCC, going against Southwestern Bell, SBC, Ameritech, GTE (now Verizon), and some of the petitioner's amici. Missouri fully embraces the concept of competition on a level playing field. But Missouri's legislature has made the policy determination that government entering the private sector will not create a level playing field, and in fact, may kill the vibrant business of small incumbent local exchange carriers that provide local service to Missouri's four corners and enable it to brag about a 95.8% rate of telephone service penetration statewide, while the national average is 94.4%. (*See* Table 17.2, FCC Report, Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, August 2001. File Names: TREND101.ZIP, TREND101.PDF AT www.fcc.gov.ccb.stats.) Competition from the government can also stymie private enterprise in more populated areas where competing local exchange carriers, particularly those who are facilities based, might be dissuaded from competing against both and incumbent local exchange carrier (particularly in the form of large, nationwide local exchange carriers) and the local municipality.

States can allow their municipal utilities to provide telecommunications services under the '96 Act. And some States do. But allegations of increased

competition and broader service – even if they are true – do not justify removing from the States the power to weigh the advantages and disadvantages, the risks and benefits, of letting public agencies become commercial businesses.

The Missouri Municipals refuse to acknowledge that this case is not about telecommunications. One could substitute any subject matter for the last two words of § 253(a) – "telecommunications service" – and Missouri would still be here, arguing its sovereign right to withhold authority from its own political subdivisions. The economic arguments about allowing municipalities to provide commercial telecommunication services cut both ways and have no bearing on the real issue in this case – the sovereign right of a state to control its own political subdivision. If Congress can interfere with a state's control over its political subdivisions "unselfconsciously" (borrowing that term from MML Br.11), using terms that do not clearly or unmistakably demonstrate that Congress chose to usurp state sovereignty, then the plain statement test in *Gregory v. Ashcroft* is dead, and worse, the Tenth Amendment becomes a vestige of history.

CONCLUSION

For the reasons stated in the State's opening brief and further explained above, the Court should reverse the Eighth Circuit's decision and remand the case with instructions to reinstate the FCC's order denying preemption of Mo. Rev. Stat. § 392.410.7, and thus preserve the States' power to allocate authority to and among their officers, agencies, and political subdivisions.

Respectfully submitted,

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